

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 03 August 2005

BALCA Case No.: 2004-INA-317
ETA Case No.: P2003-NJ-02491723

In the Matter of:

JORAMA CONSTRUCTION, INC.,
Employer

on behalf of

ANTONIO MARCOS BEGALLI,
Alien.

Appearance: **Cassandre C. Lamarre, Esquire¹**
Newark, New Jersey
For the Employer and the Alien

Certifying Officer: **Dolores DeHaan**
New York, New York

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien employment certification. Permanent alien employment certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). We base our

¹ In letters dated June 30 and July 9, 2004, Ms. Cassandre C. Lamarre stated that she was no longer with the firm Wall Street Associates, and thus no longer represented any of her former immigration clients. She requested that all future correspondence in this case be directed to Ms. Andrea Matos of Wall Street Associates. (AF 1-3).

decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On April 30, 2001, the Employer filed an application for alien employment certification on behalf of the alien, Antonio Marcos Begalli, to fill the position of "Stone Mason." (AF 47-48, 67-68). The Employer also requested a reduction in recruitment ("RIR"), stating, "This is a request for an Advanced Recruitment. R.I.R." (AF 78). The Employer described the Stone Mason position on the application as follows:

Lays building materials such as stone for commercial and residential development projects. Pours, spreads and finishes concrete for all stone repairs and builds foundations walls, sidewalks, porches, steps, stairways, fireplaces, BBQ pits, arches abutments and sewers. Cuts all stone according to written specification and shapes them preparatory to setting using chisel hammer, grinder, power saws. Aligns stone and sets them in place by hand or by crane. Cleans surface using muriatic acids and brushes. Works Monday thru Friday.

(AF 47, 67).

The New Jersey Department of Labor received the Employer's application for alien labor certification and thereafter advised the Employer of defects in the application. It advised the Employer to check its Federal Employer Identification Number ("FEIN") and also informed the Employer that its Form G-28 was missing. The Employer responded by providing its FEIN and stating that it did not require a G-28 because it was not an attorney, but instead was an agent. The New Jersey Department of Labor then issued a statement that the Employer's documentation was in order and that the Employer's application included "G-28 or Agent Authorization," "Copy of Posting," "Request for Reduction in Recruitment," "Copy of Advertisement" and "Employer Statement of Recruitment Results." (AF 63-64, 66).

The Employer had advertised the Stone Mason position in a newspaper for three days, including on March 28 and 29, 2001.² The Employer had also advertised the position on its company trucks from March 26, 2001, to April 27, 2001. However, the Employer reportedly had received no responses to its advertisements. (AF 72-77).

On October 20, 2003, the CO issued a Notice of Findings (“NOF”), proposing to deny certification. In the NOF, the CO denied the Employer’s request for RIR, explaining that there was no Internet listing for the Employer or the Employer’s President who signed the application for alien employment certification, and the telephone number given by the Employer was not listed. In addition, the CO explained that the FEIN submitted by the Employer was inactive and had been inactive since September 30, 2001. (AF 52-53, 59-60).

The CO advised the Employer that in order to rebut the NOF, it had to explain why it had been listed in the New Jersey Unemployment Insurance Computer system at a different address and as an inactive Employer since September 30, 2001. It also had to prove itself to be currently operational by “submit[ting] telephone bills, rental receipts, real estate tax bills, etc. as evidence.” In addition, it had to document the number of workers it employed in 2001, 2002, and 2003, and give their names, job duties, and job status. It further had to submit contracts from 2001, 2002, and 2003, documenting how it was able to guarantee permanent full-time employment for its Stone Mason position. Lastly, the CO advised the Employer to document its willingness to advertise the position. (AF 53).

The Employer filed a rebuttal on November 18, 2003, explaining that it initially had a FEIN that corresponded with a friend’s address instead of a company address because the Employer did not have a location at the time it acquired its FEIN. However, the Employer stated that it had updated its address to match its FEIN. The Employer stated that it did not know why its FEIN was inactive. With regard to its telephone

² Although there are copies of three different newspaper postings, the name of the newspaper is not shown nor is the date of the third posting shown.

number, the Employer admitted that it had changed the number, but upon calling the old number, one would have been apprised of the new number. To prove that it was operational, the Employer submitted past taxes, contracts, W-2s, employee listings, and a past telephone bill. In addition, the Employer indicated its willingness to advertise the position again. (AF 28-46).

In response to the Employer's rebuttal, the CO issued a second Notice of Findings ("SNOF") on December 16, 2003, proposing once again to deny certification. The CO explained that the Employer "must document why there is no record of his company in the State Unemployment Insurance (UI) system, either under his FEIN number or company name; if there is a listing, to furnish the name and number under which it is listed." The CO explained that the lack of a record of the Employer in the State Unemployment Insurance system could indicate that it had no employees. Thus, the CO instructed the Employer to submit additional documentation for the years 2001, 2002, and 2003, including copies of Form NJ-927, Employer's Quarterly Report, and Form WR-30, Employer's Report of Wages Paid. The CO also stated that Item 15 of ETA7-50B had to be updated to include the Alien's work history since January 1999, and had to include his current employment, and be initialed and dated by the Alien. In addition, the CO explained that the change in agent on both the ETA 7-50A and B forms had to be initialed and dated. (AF 24-25).

On January 16, 2004, the Employer submitted a second rebuttal proffering that it had checked and it was listed in the State Unemployment Insurance system. With regard to the CO's request for additional documentation, the Employer responded with the following statement: "I do not feel comfortable giving my personal documents. I already gave my taxes and I feel the more I give you, the more you will still be asking for." The Employer did, however, make the designated corrections to the ETA 7-50A and B forms as instructed by the CO. (AF 8-10, 18-23).

On February 4, 2004, the CO issued a third Notice of Findings ("TNOF") to correct its statement in the SNOF that "there is no record of his company in the State

Unemployment Insurance (UI) system.” In the TNOF, the CO explained that there had always been a record of the Employer in the State Unemployment Insurance system, but that the listing had been inactive since September 30, 2001, and was checked again on December 4, 2003, and was still reportedly inactive. In this TNOF, the CO repeated the deficiencies stated in the SNOF. (AF 15-17).

On February 10, 2004, the Employer submitted a third rebuttal stating that there was a problem with its company listing the year before but that the Employer was “going about fixing it for this year.” The Employer stated that it believed it had “provided...enough information.” (AF 14).

The CO found that the Employer’s third rebuttal failed to cure the deficiencies noticed in the TNOF, and thus issued a Final Determination on March 17, 2004, denying alien employment certification for the reasons discussed below. (AF 12-13).

DISCUSSION

Under 20 C.F.R. § 656.3, an “employer” is defined as “a person, association, firm or corporation which currently has a location within the United States to which U.S. workers may be referred for employment.” Under 20 C.F.R. § 656.20(c)(8), a job opportunity must truly exist and be open to any qualified U.S. worker. When an employer files an application for alien employment certification, it is signifying that it has a *bona fide* job opportunity that is open to U.S. workers. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*).

An employer must provide information sought by the CO if such information has a direct bearing on the resolution of an issue and is obtainable by reasonable effort. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Under 20 C.F.R. § 656.25(e)(3), all findings in the Notice of Findings not rebutted are deemed admitted. Thus, failure to submit documentation reasonably requested by the CO warrants denial of an employer’s application for alien employment certification. *Gencorp*, *supra*.

Here, in three separate NOFs, the CO identified numerous deficiencies in the Employer's alien employment certification application, and repeatedly stressed that the Employer had to explain why its FEIN, used in the New Jersey Unemployment Insurance Computer system, was inactive and had been inactive since September 30, 2001. (AF 15-16, 24-25, 52-53). Although the Employer submitted past taxes, phone bills, contracts, W-2s, and employee listings to prove that it was operational (AF 28-46), it never corrected or explained the deficiency involving its FEIN.

In the TNOF, the CO instructed the Employer for the last time that it "must further document why there is no active record of his company in the State UI system." The CO explained, "The lack of an active record may indicate he has had no employees since some time in 2001. His documentation must include copies of Form NJ-927 Employer's Quarterly Report and WR-30 Employer Report of Wages Paid for all quarters beginning July 2001 through 2003." The Employer was then advised that if it had never filed these forms, it would also be in violation of the requirement that "the employer's job opportunity's terms, conditions and occupational environment are not contrary to Federal, State or local law." 20 C.F.R. 656.20(c)(7). (AF 16).

The Employer failed to produce the requested documentation or offer an explanation for its failure to do so. Instead, the Employer stated, "I have provided you with enough information and I do not feel that you have any intention of putting this case forward." (AF 14).

The CO's Notices of Findings of October 20, 2003, December 16, 2003, and February 4, 2004, addressed the Employer's inactive FEIN number and gave the Employer three opportunities to offer an explanation for this deficiency. (AF 15-16, 24-25, 52-53). In the CO's SNOF and TNOF, it advised the Employer that its inactive FEIN could indicate that it had no employees since 2001. Thus, the CO instructed the Employer to submit Forms NJ-927 and WR-30 for proof that it had employees. (AF 15-

16, 24-25). However, the Employer failed to provide this evidence in its rebuttals. This documentation was critical to establish that a *bona fide* position existed.

As stated above, an employer's failure to submit documentation reasonably requested by the CO warrants denial of certification. *Gencorp, supra*. Here, the Employer did not comply with the CO's TNOF and thus failed to prove that it had a *bona fide* job opportunity as mandated by 20 C.F.R. § 656.20(c)(8). Accordingly, the Employer's application for alien employment certification is denied.

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Subsequent to *Compaq Computer, Corp.*, however, this panel recognized that a remand is not required where the application is so fundamentally flawed that a remand would be pointless, such as finding of a lack of a *bona fide* job opportunity. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004). That is the circumstance in this case. Accordingly, the CO's denial of labor certification will be affirmed.

ORDER

The CO's denial of alien employment certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of

Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.